No. 22441

United States Court of Appeals

FOR THE NINTH CIRCUIT

SHELL OIL COMPANY, *Appellant*

v.

RUSSELL L. JONES, ET AL., *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLANT

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JURISDICTION

This is an appeal from an order of the United States Court for the Northern District of California entered on October 12, 1967 (R. 152-153) which granted plaintiffs' Motion for a Protective Order Pursuant to Rule 30(b) of the Federal Rules of Civil Procedure (R. 56).

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331 and 15 U.S.C. § 15. A Notice of Appeal was filed by Appellants on November 1, 1967 (R. 154). This Court has jurisdiction to review the order based on 28 U.S.C. § 1291 and the All Writs Act 28 U.S.C. § 1651(a).

STATEMENT OF THE CASE

This is a private antitrust action initiated after the filing of an indictment charging four individuals [1] and three trade associations [2] with having violated the Sherman Act by engaging in a horizontal conspiracy to fix the price of gasoline sold at service stations (*United States* v. *California Shell Dealers Association, Inc.*, Criminal No. 41348 (N.D. Cal. filed April 26, 1967)).[3]

Two months *after* this indictment was returned, 72 present and former dealers of Shell Oil Company (Shell), including 3 of the individuals named as defendants in the antitrust indictment,[4] filed this civil complaint on behalf of themselves and all other Shell dealers similarly situated (R. 1-11). The complaint alleges that each of the plaintiffs is a member of one or more of the indicted trade associa-

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[1] John A. Mullins, Joseph Chandler, John Macchitelli and Earl C. Schweizer.

[2] California Shell Dealers Association, Inc., Southern Alameda County Retail Petroleum Dealers Association and Santa Clara County Shell Dealers Association.

[3] The Indictment, a copy of which is included in the record (R. 75-82), charged the defendants with conspiring:

(a) To raise, fix, establish and maintain the price of gasoline sold in service stations.

(b) To raise, fix, establish and maintain margins.

(c) To eliminate the giving of trading stamps.

(d) To eliminate the posting of price signs.

(e) To harass and annoy service stations which continue to give trading stamps or post price signs.

[4] John A. Mullins, Joseph Chandler and Earl C. Schweizer.

tions and charges, *inter alia,* that Shell "coerced Shell dealers both directly and indirectly to follow prices set by Shell" and that Shell maintained "control over all aspects of retail outlets operated by its dealers" through its alleged "domination and control over the dealers" (R. 6, 9).

Plaintiffs urged below that this complaint was "precipitated by the fact that they felt that they had been unjustifiably indicted by the Government" (Tr. 21, and see Tr. 10).[5] As Judge Weigel stated, "they came back and said that the Government was after the wrong party, the Government was going for the cylinders instead of wheels, and they filed suit" (Tr. 20).

After the complaint in this action was filed, Shell noticed the taking of depositions of the Plaintiffs. (R. 12-15)[6] Thereafter Shell filed its answer alleging, as an affirmative defense, that the Plaintiffs' right to recover damages, or any other relief, is barred by the Plaintiffs' participation in a conspiracy to restrain trade in the sale of gasoline in California. Shell also filed a counterclaim based on like allegations. (R. 7, 11-19).

On July 25, 1967 Shell commenced the taking of the Plaintiffs' depositions and Mr. Richard Gray, the first Plaintiff deposed, testified, *inter alia,* that he had been a witness before the grand jury which returned the indictment against *California Shell Dealers Association, Inc., et al.*[7]

Thereafter, Plaintiffs filed a motion pursuant to Rule 30(b) of the Federal Rules of Civil Procedure seeking to

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[5] "Tr. —" refers to the transcript of the hearing before Judge Weigel which was filed as part of the record on appeal.

[6] Many of the 72 Plaintiffs have subsequently been dismissed as parties to this action (See *e.g.* R. 150-151). At the time the Notice of Appeal was filed there were 57 individuals remaining as Plaintiffs to this lawsuit. At present only 42 individuals remain as plaintiffs to this lawsuit.

[7] See Appendix B.

seal the depositions of Plaintiffs (R. 56). Plaintiffs claimed, "The basic problem to which this motion is addressed is that the United States Government in its criminal action against plaintiffs[8] is not entitled to the pre-trial discovery available in the treble damage cases under the Federal Rules of Civil Procedure" (R. 63).

A hearing on plaintiffs' motion was held before Judge Stanley A. Weigel on September 18, 1967. At that hearing Judge Weigel summarized the issues involved in appellees' motion for a Protective Order.

> We have a problem, regardless of who it is, that a party comes into the United States District Court—parties—and say they want damages against someone else. Having done that, counter-claim was invited. Having done that, I wonder if this Court is acting altogether in good conscience if this Court said, "All testimony has got to be in secret to protect plaintiffs against criminal action."
>
> I am uncomfortable about such an order. I am uncomfortable about such an order despite the fact that the bench [memorandum] before me suggests there are good reasons for it. I don't like that kind of an order (Tr. 14).

Judge Weigel, however, asked for further briefs by the parties and invited the Government to file a brief *amicus curiae* (Tr. 29-30). After these briefs had been submitted, Judge Weigel, on October 12, 1967, entered an order sealing the depositions of the plaintiffs. In addition, Judge Weigel's order required that, at the termination of the action, Shell turn over all transcripts of the examination of Plaintiffs by deposition to the Plaintiffs; that the depositions take place with no one present except the parties, their officers or counsel; and that the transcript of the deposition and the information contained therein

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[8] It should be noted that only 3 of the Plaintiffs in this action are under indictment (see p. 2, *supra*).

not be disclosed to the operating personnel of the defendant or to any third parties (R. 152-153). We estimate the transcripts ordered to be turned over to Plaintiffs will cost Shell well in excess of $25,000.

On October 30, 1967 Shell appealed from this order (R. 154). On November 3, 1967 Shell was served with Plaintiffs' (Appellees') *Motion to Docket and Dismiss Appeal* and on November 8, 1967 Shell filed a motion asking that this Court postpone any action on appellees' Motion to Dismiss until full briefing on the merits.

After Judge Weigel entered the protective order, Plaintiffs sought an order which would have similarly sealed their answers to certain of defendant's interrogatories. Plaintiffs' *Memorandum of Points and Authorities* in support of their motion stated only that:

> Plaintiffs request that their answers to certain of the defendant's interrogatories be placed under seal in the same manner and for the same reasons that the Honorable Stanley A. Weigel ordered the depositions of the same plaintiffs be placed under seal (Protective Order Pursuant to Rule 30(b) of the Federal Rules of Civil Procedure, filed on October 12, 1967). Plaintiffs incorporate by reference in full their Brief in Support of Plaintiff's Motion for a Protective Order Pursuant to Rule 30(b) and Rule 33 (insofar as it incorporates Rule 30(b)) and the letter of October 6, 1967 from Keith E. Pugh, Jr. to the Honorable Stanley A. Weigel, copies of which were sent to all counsel of record.

On November 20, 1967, Judge Sweigert ruled from the bench that he would deny plaintiffs' motion seeking to place their answers to certain of defendant's interrogatories under seal. Judge Sweigert apparently felt that the critical fact was that it was the *plaintiffs*, who had initiated the litigation, who were seeking to seal the pre-trial proceedings (App., pp. 25-27).[9]

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[9] The transcript of the hearing before Judge Sweigert is attached as an Appendix to this brief at pp. 25-27, *infra*.

Shell filed with this Court a copy of the transcript of the hearing before Judge Sweigert.[10] This Court has entered an order that the Appellees' Motion to Dismiss be passed for consideration to the hearing of the case on the merits.

On December 13, 1967 Shell was served with Plaintiffs' Notice of Appeal from Judge Sweigert's order. In addition, Plaintiffs filed with this Court a motion to docket their appeal and requested that the Court consider Plaintiffs' appeal in connection with Shell's appeal from Judge Weigel's order.

SPECIFICATION OF ERROR

The district court erred in entering the Protective Order Pursuant to Rule 30(b) of the Federal Rules of Civil Procedure.

ARGUMENT

I. THE ORDER BELOW WHICH PROHIBITS SHELL FROM DISCLOSING THE INFORMATION CONTAINED IN THE TRANSCRIPTS OF ITS EXAMINATION OF PLAINTIFFS BY DEPOSITION TO ANY OF ITS OPERATING PERSONNEL OR OTHER THIRD PARTIES, AND WHICH REQUIRES SHELL TO TURN OVER TO PLAINTIFFS, AT THE TERMINATION OF THIS LITIGATION, ALL COPIES OF SUCH TRANSCRIPTS IN ITS POSSESSION CONSTITUTES AN ABUSE OF DISCRETION

The issue presented in this appeal, and upon which two judges below split, is whether the 42 remaining plaintiffs who filed this civil antitrust suit two months *after* the indictment involved was returned, are entitled to a protective order under Rule 30(b) in order to protect the asserted rights of the defendants to the criminal indictment, three of whom are parties to this suit. Resolution of the questions of the propriety of Judge Weigel's order and whether he abused his discretion turns, we submit, on two critical facts. First, that it is the plaintiffs, who voluntarily initiated this action after the indictments had

[10] See Supplemental Memorandum filed by Shell in this Court.

been returned, who are seeking to have the depositions sealed and second, that only three of the plaintiffs had been named as defendants in the criminal antitrust suit.

Under the Federal Rules of Civil Procedure all proceedings of a court, including depositions, are normally open to the public. Rule 30(f)(1) of the Federal Rules of Civil Procedure provides that the officer before whom a deposition is taken must file the transcript with the clerk of the court and, of course, all court records are normally open to the public. As this Court has pointed out in *Olympic Refining Co.* v. *Carter,* 332 F. 2d 260, 264 (C.A. 9 1964):

> In the federal judicial system trial and *pretrial proceedings* are ordinarily to be conducted in public. Rule 43(a), Federal Rules of Civil Procedure, provides that in all trials the testimony of witnesses shall be taken orally in open court unless otherwise provided in the rules (emphasis supplied).

It is only in the unusual situation that a court will order the sealing of depositions. *Pearson* v. *McCarthy,* 16 F.R. Serv. 30b.342 (D.C.D.C. 1951).

The policy of keeping all pre-trial proceedings open to the public is particularly strong in the field of antitrust litigation. The Publicity in Taking Evidence Act, 37 Stat. 731 (1913); 15 U.S.C. § 30, provides that in Government antitrust litigation, "In the taking of depositions . . . the proceedings shall be open to the public as freely as are trials in open court; and no order excluding the public from attendance on any such proceedings shall be valid or enforceable." This Court has recognized that the policy of that Act extends beyond its express terms, *Olympic Refining Co.* v. *Carter, supra.* As this Court recognized in that case, the purpose of the Act is to make available to potential treble-damage plaintiffs evidence of any alleged violations of the Sherman Act for "Private treble-damage actions are an important component of the

public interest in 'vigilant enforcement of the antitrust law.' *Lawlor* v. *National Screen Serv. Corp.*, 349 U.S. 322, 329'' (*Olympic Refining, supra,* at p. 264).

In view of this strong public policy of keeping pretrial proceedings—particularly in antitrust litigation—open to the public, it is clear that there are no unusual circumstances warranting the entry of an order sealing all the transcripts of the depositions of the Plaintiffs and directing Shell to turn over all of the transcripts of such depositions in their possession to Plaintiffs at the termination of this litigation.

Although orders staying the taking of depositions [11] or sealing depositions [12] have been granted in some instances where the defendants in a civil suit were also defendants in a criminal action covering the same subject matter, Plaintiffs have not pointed to one case where such an order was granted upon motion of a criminal defendant who voluntarily subjects himself to the discovery procedures of the Federal Rules by initiating a civil action after the return of an indictment. Whatever public policy may justify a sealing order pursuant to 30(b) upon the motion of a defendant to concurrent civil and criminal actions, who is thus involuntarily before the Court, this policy has no applicability to the case of a criminal defendant who voluntarily initiates a civil lawsuit, and certainly has no applicability to those Plaintiffs whose only connection with the prior criminal case is that they are members of the indicted trade associations.

Plaintiffs below attempted to justify a sealing order on the ground ''that the United States Government in its criminal action presently pending against plaintiffs is not

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[11] See e.g. *Perry* v. *McGuire,* 36 F.R.D. 272 (S.D.N.Y. 1964); *Harrigan & Sons* v. *Enterprise Animal Oil Co.,* 14 F.R.D. 333 (E.D. Pa. 1953); *National Discount Corp.* v. *Holzbaugh,* 13 F.R.D. 236 (E.D. Mich. 1952).

[12] *D'Ippolito* v. *American Oil Co.,* 272 F. Supp. 310 (S.D.N.Y. 1967).

entitled to the pre-trial discovery available . . . under the Federal Rules of Civil Procedure" (R. 4). But it is not the Government which is conducting this pre-trial discovery. As the Second Circuit has recently stated in somewhat similar circumstances, "The fact that additional testimony thereby becomes available to the government is merely the natural byproduct of another judicial proceeding; and to that extent it might be 'discovery,' but it is not discovery which the government has initiated or promoted for the purpose of circumventing the Federal Rules of Criminal Procedure or any constitutional right of the appellees." *United States* v. *Simon,* 373 F. 2d 649, 652 (C.A. 2 1967); *certiorari granted, sub nom. Simon* v. *Wharton,* 386 U.S. 1030 (1967).

In this case four individuals and three trade associations were indicted for engaging in a horizontal price fixing conspiracy. Within two months three of these individual defendants joined together with 69 other Shell dealers, 30 of whom have subsequently withdrawn from the suit, and brought a civil treble-damage action against Shell charging that Shell had "coerced Shell dealers directly and indirectly to follow the prices set by Shell . . ." and "[maintained] control over all aspects of retail outlets operated by its dealers" (R. 9). Plaintiffs concede that this action was precipitated by the Government's indictment and that they brought this suit to vindicate themselves (Tr. 20-21). This should be apparent since the complaint charges that Shell has "fixed their retail prices against their will" since 1960 (Tr. 20, R. 6, 9), yet this action was not commenced until after the indictment issued.

Plaintiffs are attempting to use the District Court as both "a sword and a shield." *Independent Productions Corp.* v. *Loew's, Inc.,* 22 F.R.D. 266, 277 (S.D.N.Y. 1958). They are seeking to use this action as a sword to vindicate the defendants in the criminal case and as a shield to prevent the public from learning of any wrongdoing on

their part. Of course, if evidence were developed by plaintiffs in this action to support their charge that Shell coerced them to follow prices set by it this would be useful to the defendants in the criminal case.

In a somewhat analogous situation, where a corporation had initiated a private treble-damage action and its president then refused to answer questions during deposition on the grounds of a testimonial privilege, the Court held that even if a testimonial privilege existed it would be compelled to find a waiver. *Independent Productions Corp.* v. *Loew's, Inc., supra,* at pp. 276-279. As that court stated:

> Plain justice dictates the view that, regardless of plaintiffs' intention, plaintiffs must be deemed to have waived their assumed privilege by bringing this action (22 F.R.D. 276).
>
> . . . *Plaintiffs in this civil action have initiated the action and forced defendants into court. If plaintiffs had not brought the action, they would not have been called on to testify. Even now, plaintiffs need not testify if they discontinue the action. They have freedom and reasonable choice of action.* They cannot use this asserted privilege as both a sword and a shield (*Id.* at 277, emphasis added).

Similarly, in *Henrik Mannerfrid, Inc.* v. *Teegarden,* 23 F.R.D. 173, (S.D.N.Y. 1959), where the plaintiff refused to answer interrogatories because it claimed the informer's privilege, the Court ruled:

> Fairness to the opposition may require plaintiff to forego the protection that the law will ordinarily afford to one who has not instituted a lawsuit (*Id.* at 177).

And see, *Awtry* v. *United States,* 27 F.R.D. 399, 402 (S.D.N.Y. 1961) (". . . plaintiff may not continue this action and at the same time deny to defendant the right to avail itself of the pre-trial procedures necessary to

prepare its defense''); and, *Fleming* v. *Bernardi,* 1 F.R.D. 624 (N.D. Ohio 1941). Similarly here, Plaintiffs should not be permitted, as the order below would permit them, to initiate a lawsuit and then seriously prejudice defendant's right to conduct pretrial discovery and prepare its defense.

Shell will be prevented from adequately preparing its defense because, although Judge Weigel's order permits Shell to use the transcripts of Plaintiffs' depositions ''in the preparation for trial,'' it specifically prohibits Shell from showing any of these transcripts or disclosing any information contained in them to any of its operating personnel or any other third parties (R. 152). Thus Shell is precluded from showing these transcripts to prospective witnesses. But Shell must be able to review Plaintiff's testimony in deposition with prospective witnesses if it is to prepare its defense.

For example, Plaintiffs, all of whom are, or were, Shell dealers, have charged Shell with coercing them to follow prices set by Shell and with controlling many business aspects of retail outlets operated by its dealers ''through a system of policing which subjects the dealer to inspection, surveillance and harassment by Shell's *dealer representatives* and others'' (R. 6, emphasis supplied). Thus, one of the critical charges against which Shell must defend itself is whether or not its ''dealer representatives'' did engage in a system of policing which subjected the plaintiffs to ''inspection, surveillance and harassment.'' In order to prepare a meaningful defense to this charge Shell must be able to confer with its dealer representatives and other operating personnel and review with them Plaintiffs' deposition testimony dealing with this subject. Similarly, Shell must review Plaintiffs' testimony with its operating personnel in order to develop the facts relating to its affirmative defense that Plaintiffs have engaged in a horizontal price fixing conspiracy. Shell's operating personnel in the San Francisco area are

the most knowledgeable people in the Shell organization with regard to the subject of the pricing, and other activities of the Plaintiffs.

Moreover, a number of the Plaintiffs have already been deposed and Shell has reason to doubt the credibility and veracity of some plaintiffs' testimony. In this regard, Shell has reason to believe that others were present at meetings and invited to join the conspiracy and that still others were threatened that they would be "picketed" and harassed unless they joined the conspiracy and agreed that they would not post price signs. Shell must talk to these other Shell dealers, including those 30 Plaintiffs who have dropped out of this suit, and review Plaintiffs' depositions with them. These people would have direct and personal knowledge of the matters testified to by Plaintiffs. Yet under Judge Weigel's order Shell may not discuss Plaintiffs' testimony with these people or anyone else who might be able to shed light on these matters.[13] Indeed it is doubtful, under Judge Weigel's order, whether Shell could even show the transcripts to other non-party witnesses during their examination by deposition.

Finally, Plaintiffs purport to bring this suit as a class action "on their own behalf and on behalf of all Shell Oil Company dealers in the counties of Alameda, Santa Clara, San Mateo, Contra Costa, Marin and San Francisco, and the Sacramento-Auburn-Roseville area, . . . pursuant to Rule 23 of the Federal Rules of Civil Procedure . . ." (R. 2). The District Court has not yet ruled on the propriety of the class action. If it should hold this to be a proper class action, Rule 23(c)(2) provides that any

[13] Judge Weigel's order would also prevent Shell from bringing to the United States attorney's attention any instance of what it believes to be perjurious testimony in Plaintiffs' depositions. In effect, Plaintiffs would be immunized from any possibility of prosecution for any perjury they might commit during the depositions. On the other hand, if Plaintiffs know that their testimony may be scrutinized by the United States attorney they are much more likely to be careful to answer any question put to them fully and truthfully.

member of the class may request that the Court exclude him from the suit. Under the new Rule 23 all members of the class are bound by the judgment for or against the named parties—unless they elect to be excluded. After being informed as to the nature of this suit, many members of the class on whose behalf this action was brought may decide that they do not wish to be parties to this action. Shell believes it should have the right to inform the members of the class what plaintiffs have testified to in deposition so that they may make an informed judgment as to whether they wish to be bound by the Plaintiffs' conduct in this action.[14]

Even assuming, *arguendo,* there was some justification for sealing the depositions of the Plaintiffs Mullins, Macchitelli and Schweitzer because they are defendants in a criminal case, no such rationale would extend to the other 39 Plaintiffs remaining in the case. These other 39 Plaintiffs are not defendants in the Government's criminal suit. They are not seeking to have their depositions kept secret in order to protect their own rights, but in order to protect the rights of others. Certainly, at least as to these other 39 Plaintiffs there is no problem in preserving any asserted rights to a fair trial in a criminal case.

These Plaintiffs have not presented any unusual circumstances to overcome the strong public policy in favor of keeping all pretrial discovery, especially in antitrust litigation, open to the public. *Olympic Refining Co.* v. *Carter, supra; Pearson* v. *McCarthy, supra.* Indeed, their situation presents the usual situation in private antitrust litigation where the issue normally is whether the parties have engaged in criminal conduct, since any violation of the Sherman Act constitutes a criminal offense

[14] Indeed, the likelihood that after being fully informed many of these members of this class may choose to withdraw from this suit is demonstrated by the fact that of the original 72 named Plaintiffs to this action, 30 have already withdrawn from this lawsuit.

(15 U.S.C. §§ 1, 2). Certainly the courts will not seal the depositions in all private Sherman Act cases merely because they might reveal that one of the parties has violated the law; and, *a fortiori*, a plaintiff may not initiate a lawsuit and then enlist the Court's aid in keeping secret any evidence of criminal activity. As Judge Weigel stated below:

> The plaintiffs come into the Court and they want damages . . . treble damages. If they come into Court voluntarily, why should this Court throw its arms around them and screen from visibility to anybody that wants to have an interest in anything criminal they may have done? What sense does that make? (Tr. 7-8).

Plaintiffs also took the somewhat novel position that they wished the Court to enter a sealing order in order to make Shell's discovery more effective. Indeed, they asserted "that Shell's discovery could not possibly be effective without it" (R. 124),[15] Plaintiffs claimed that unless a secrecy order were entered they could invoke the privilege against self incrimination and refuse to answer any questions during the depositions (R. 124).

Aside from the dubiety of such claim of the privilege (see pp. 10-11, *supra*),[16] Plaintiffs' invocation of the privilege is premature. In effect, plaintiffs requested the District Court to seal the depositions because they might give "extremely guarded testimony" or because "they

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[15] Of course this assertion that Shell will not be prejudiced proceeds from Plaintiffs' charge that Shell's purpose in opposing the sealing order was its desire to use its "right to discovery as a means to achieve an improper end," *i.e.* to conduct discovery for the Government in its criminal case (R. 124). Contrary to Plaintiffs' unsupported charge, Shell has opposed the sealing not for the purpose of helping the Government try its case, but because, as we have shown *supra* at pp. 11-13, the order will prevent Shell from preparing its defense.

[16] See also the order of Judge Muecke in *Blakely Oil Inc.* v. *Shell Oil Co.*, Civ. 5510-Phx, (D. Arizona, September 15, 1966) at R. 148.

may be justified in remaining completely silent about certain aspects of their business" (R. 17). But plaintiffs are not entitled to a protective order because they claim that they may invoke the privilege against self incrimination. *Shiner* v. *American Stock Exchange,* 28 F.R.D. 34 (S.D.N.Y. 1961); *United States* v. *Lustig,* 16 F.R.D. 138 (S.D.N.Y. 1954); cf. *Kaeppler* v. *Jas. H. Matthews & Co.,* 200 F. Supp. 229 (E.D. Pa. 1961). As the Court held in *Lustig, supra,* at pp. 139-140:

> The time to assert the plea is when specific questions are put to the defendant during the course of the examination.
>
> * * *
>
> To uphold the defendant's plea in advance of the taking of his testimony upon the mere filing of his affidavit asserting the privilege would take from the Court the determination of the basic issue of whether or not an answer in response to specific questions would incriminate the defendant or subject him to real danger and leave its determination entirely to the defendant. This is not the law.

That Plaintiffs' claim is premature is demonstrated by the fact that at least one,[17] and possibly several, of the Plaintiffs were called as witnesses before the grand jury which returned the indictment in *United States* v. *California Shell Dealers Association, Inc.* (Criminal No. 41348 filed April 26, 1967), and have therefore received immunity from prosecution under the Antitrust Immunity Statute, 32 Stat. 904 (1903), 15 U.S.C. § 32 [18] (See *United*

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[17] See Appendix B.

[18] The Antitrust Immunity Statute, as it appears at 15 U.S.C. § 32 (1964) reads:

> "No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under sections 1-7 of this title and all Acts amendatory thereof or supplemental thereto, and sections 8-11 of this title: *Provided,* That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying."

States v. *Monia,* 317 U.S. 424 (1943)), and thus plainly cannot claim the privilege. *Brown* v. *United States,* 359 U.S. 41 (1959); *Kronick* v. *United States,* 343 F. 2d 436 (C.A. 9 1965).

Finally, there is no justification for requiring Shell to turn over to the plaintiffs copies of transcripts of depositions it has and will purchase. Plaintiffs below failed to give any reasons why this unusual provision was necessary. Certainly Shell is entitled to retain possession to these transcripts which it has and will purchase, at substantial cost, pursuant to Rule 30(f)(2). Plaintiffs have no legal right to these transcripts. The order below thus deprives Shell of its property without due process of law in violation of the provisions of the Fifth Amendment (United States Constitution, Amend. V).

II. THE ORDER BELOW IS A FINAL APPEALABLE ORDER

28 U.S.C. § 1291[19] provides that an appeal may be taken from any final order of a District Court. The Supreme Court has made clear "a decision 'final' within the meaning of § 1291 does not necessarily mean the last order possible in a case." *Gillespie* v. *United States Steel Corp.,* 379 U.S. 148, 152 (1964). An order which is collateral to rights asserted in an action which finally determines the rights of the parties and which will not be affected by a decision of the merits of the case, or which is "fundamental to the further conduct of the case" is appealable under 28 U.S.C. § 1291. *Gillespie* v. *United States Steel Corp.* (*supra* at p. 154); *DiBella* v. *United States,* 369 U.S. 121, 125-126 (1962); *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1948); *Swift & Company Packers, et al.* v. *Compania Colombiana Del Caribe, S.A.,*

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[19] 28 U.S.C. § 1291 provides in pertinent part:
"The courts of appeals shall have jurisdiction of appeals from all final orders of the district courts of the United States . . ."

339 U.S. 684, 688-689 (1950); *Preston* v. *United States,* 284 F. 2d 514 (C.A. 9 1960). As the Supreme Court stated in *DiBella, supra,* at p. 126:

> Similarly, so as not to frustrate the right of appellate review, immediate appeal has been allowed from an order recognized as collateral to the principal litigation because touching matters that will not "affect, or . . . be affected by, decision of the merits of [the] . . . case," Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 . . . when the practical effect of the order will be irreparable by any subsequent appeal. E.g., Stack v. Boyle, 342 U.S. 1; . . . Swift & Co. Packers v. Compania Colombiana Del Caribe S.A., 339 U.S. 684, 688-689.

In *Cohen,* a stockholders' derivative action based on diversity jurisdiction, the District Court denied defendant's motion that plaintiff be compelled to post security for costs, as required by state law. On appeal the Court of Appeals for the Second Circuit held the order reviewable and reversed on the merits. *Beneficial Industrial Loan Corp., et al.* v. *Smith,* 170 F. 2d 44 (3rd Cir. 1948), *aff'd sub nom. Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1948). The Supreme Court affirmed, spelling out in detail the circumstances meriting prompt appellate review of collateral orders which do not terminate an action.

The Supreme Court held that since the order of the District Court dealt with a collateral subject which did not "make any step toward final disposition of the merits of the case," (337 U.S. at 546) it was a final appealable order. The order of the District Court, the Supreme Court explained, related to the posting of security—a claimed procedural right—which is "not an ingredient of the cause of action" (*Id.* at 546-47). Thus, it would "not be merged in [the] final judgment"; indeed, it would be "too late" at judgment to review the order and thus "the rights conferred by the statute, if it is applicable, will

have been lost, probably irreparably."[20] (*Id.* at 546). In other words, a ruling is appealable if it determines "claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated" (*Ibid.*).

In *Gillespie* v. *United States Steel Corp., supra,* the Supreme Court held that even though a collateral order was not final under the standards enunciated in *Cohen* v. *Beneficial Industrial Loan Corp., supra* (*viz:* because the order would affect or be affected by the decision on the merits) it was nevertheless reviewable under 28 U.S.C. § 1291 if the ruling "was fundamental to the further conduct of the case" (399 U.S. at 154).

Judge Weigel's order below falls squarely within the standards of both the *Cohen* and *Gillespie* decisions.

First, it is clear that Judge Weigel's order finally determines Shell's right to retain possession of transcripts of depositions of Plaintiffs. Shell has, and will, purchase these copies of transcripts of the depositions of Plaintiffs at substantial cost. Judge Weigel's order, however, requires that, at the termination of this action, Shell turn over to the Plaintiffs all copies of such depositions. The "matter" does not remain "open, unfinished or inconclusive . . . this order of the District Court did not make any step towards final disposition of the merits of the case and will not be merged in final judgment" (*Cohen* v. *Beneficial Industrial Loan Corp., supra,* at 546).

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[20] The Court noted earlier that Section 1292(a)(1) [62 Stat. 929 (1948), as amended] "allows appeals also from certain interlocutory orders, decrees and judgments, not material to this case except as they indicate the purpose to allow appeals from orders other than final judgments when they have a *final and irreparable effect* on the rights of the parties." 337 U.S. at 545 (emphasis supplied).

If Shell is denied appellate review at this time, its right to challenge this determination of its right to retain possession of transcripts which it has purchased will be irreparably lost. For even if Shell's time in which to appeal from Judge Weigel's order had not been deemed to have expired (Rule 73(a), Federal Rules of Civil Procedure), the order below requires Shell to turn over its copies of the transcript of these depositions regardless of the disposition of the case. Thus, if the case is ultimately settled or if Shell prevails on the merits, there would be no adverse judgment from which Shell could appeal.

Second, the order below is "fundamental to the further conduct of the case" for it will prevent Shell from adequately preparing its defense. As has already been shown (*supra,* pp. 11-12), Shell cannot prepare its defense in a meaningful fashion unless it is able to review the Plaintiffs' testimony with its operating personnel and with other Shell dealers. Moreover, Judge Weigel's sealing order is likely to affect the identity of the parties to this action (*supra,* pp. 12-13).

Thus, it is clear that Judge Weigel's order is a final order reviewable at this time pursuant to 28 U.S.C. § 1298 since it is both a collateral final decision and is "fundamental to the further conduct of [this] case."

III. IF THE APPEAL HEREIN IS IMPROVIDENT THIS COURT SHOULD REVIEW THE ORDER BELOW BY TREATING THE APPEAL AS A PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION

Although we submit that the order below is clearly appealable, if this Court determines that it is not reviewable pursuant to 28 U.S.C. § 1291, the Court should still review the order by treating the appeal as a petition for a writ of mandamus or prohibition under the All Writs Act (28 U.S.C. 1651(a)). *Olympic Refining Co.* v. *Carter,* 332 F. 2d 260 (C.A. 9 1964) *cert. denied,* 379 U.S. 900 (1964);

Continental Oil Company v. *United States,* 330 F. 2d 347 (C.A. 9 1964); *Steccone* v. *Morse-Starrett Products Co.,* 191 F. 2d 197 (C.A. 9 1951); *Shapiro* v. *Bonanza Hotel Co.,* 185 F. 2d 777 (C.A. 9 1950).

Under the All Writs Act this Court "may issue all writs necessary or appropriate in aid of [its] jurisdiction."[21] Under modern practice, as applied by this Court with the Supreme Court's approval, interlocutory orders may be reviewed under the All Writs Act in "extraordinary" or "exceptional" cases where the remedy of appeal from a final decision is inadequate (*Ex Parte John H. Fahey,* 332 U.S. 258 (1947); *Hartley Pen Co.* v. *United States District Court,* 287 F. 2d 324 (9th Cir. 1961)) or where a fundamental question may be resolved in the exercise of supervisory control of inferior courts (*La Buy* v. *Howes Leather Co.,* 352 U.S. 249 (1957); *Shapiro* v. *Bonanza Hotel Co., supra*). As this Court stated in *Hartley Pen Co., supra:*

> We do not agree that the power granted this Court under the All Writs Act is to be reserved for a "cause celebre". In our view the remedy is available in an ordinary case within our jurisdiction if ordinary remedies are inadequate and there are present exceptional and extraordinary circumstances which require the issuance of an extraordinary writ to prevent a grave miscarriage of justice (287 F. 2d at 328).

It is well settled that a mandamus is the proper remedy for reviewing sealing orders which are not otherwise appealable. *Ex Parte Uppercu,* 239 U.S. 435 (1915); *Olympic Refining Co.* v. *Carter, supra.*

Moreover, the facts of this case present exceptional and extraordinary circumstances and raise a novel and fundamental question which should be resolved in the exercise

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[21] The All Writs Act, 28 U.S.C. § 1651(a), provides:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

of this Court's control of inferior courts—a question of first impression that calls for the construction of Rule 30(b) Fed. R. Civ. P. in a new context. We have not discovered, and Plaintiffs below failed to cite, a single case where a court ordered such a protective order in this situation at the behest of the party who initiated the litigation. The Supreme Court has recently made clear that mandamus is the proper remedy when a challenged discovery order presents an issue of first impression under the Federal Rules of Civil Procedure. *Schlagenhauf* v. *Holder,* 379 U.S. 104 (1964). As the Court held in that case:

> We recognize that in the ordinary situation where the sole issue presented is the district court's determination that "good cause" has been shown for an examination, mandamus is not an appropriate remedy, absent, of course, a clear abuse of discretion. See Bankers Life & Casualty Co. v. Holland, supra, 346 U.S. at 383 . . . Here, however, the petition was properly before the court on a substantial allegation of usurpation of power in ordering any examination of a defendant, *an issue of first impression that called for the construction and application of Rule 35 in a new context* (379 U.S. at 111, emphasis added).

Not only does the order below raise an issue of first impression under the Federal Rules of Civil Procedure, but this issue arises in the context of a conflict between two judges on the same issue and in the same case. Judge Weigel and Judge Sweigert were each presented, based upon identical rationales, with requests for sealing orders. As a result of this conflict the parties are in an anomalous position which calls for the Court to exercise its discretion and resolve the conflict. *United States* v. *United States District Court,* 226 F. 2d 238 (C.A. 8 1955). Clearly, the decision of the two judges below raises a fundamental question which should be resolved in the exercise of this Court's supervisory control of inferior court. *Schlagenhauf* v. *Holder, supra; La Buy* v. *Howes Leather Co., supra.* As

the Eighth Circuit Court of Appeals stated in discussing the criteria involved in the question of whether or not to review a procedural order under the All Writs Act:

> . . . the critical issue raised at this juncture strikes at a fundamental procedural question . . . the resolution of this question . . . may serve to avoid a conflict in the district courts of this circuit . . . [O]ur present consideration may likewise serve to crystallize this problem and afford a clear opportunity for its further review (*Atlass* v. *Miner,* 265 F. 2d 312, 313 (C.A. 7 1959), *aff'd* 363 U.S. 641 (1960).

Finally, Judge Weigel's order, as we have shown, constitutes an abuse of discretion. If the order is not reviewed at this time a miscarriage of justice will result, for the effect of that order, as shown above, *supra,* pp. 11-13, is to preclude Shell from preparing its defense to this action. In this situation "it would seem a part of wise judicial economy, if not necessity, to meet the issue now without subjecting the parties and the Court to the delay and burden which would be caused by the ultimate reversal clearly indicated." *Padovani* v. *Bruchhausen,* 293 F. 2d 546, 548 (C.A. 2 1961).[22]

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[22] The recent Supreme Court decision on mandamus in *Will* v. *United States,* November 13, 1967, 36 L.W. 4017, is readily distinguishable from the line of cases cited above in that it concerns the use of mandamus by the government in criminal proceedings. The Court there held that such use of mandamus was severely restricted because of the defendant's right in criminal prosecution to a speedy trial, and the general policy that "appeals by the Government in criminal cases are something unusual, exception, not favored" (36 L.W. 4018). After noting the distinction between the more liberal use of mandamus in civil actions as compared to criminal proceedings, the Court ultimately grounded its decision upon the Court of Appeals' failure to "supply any reasoned justification of its action" (36 L.W. 4021). As the Court stated, "A mandamus from the blue without rationale is tantamount to an abdication of the . . . expository and supervisory functions of an appellate court" (36 L.W. 4022).

CONCLUSION

For the foregoing reasons, we respectfully submit that the District Court's Protective Order Pursuant to Rule 30(b) of the Federal Rules of Civil Procedure be reversed, or in the alternative, that a writ of mandamus be issued directing the District Court to vacate that order.

Respectfully submitted,

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Dated: December 22, 1967.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

GERALD KADISH
Attorney

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before: Hon. William T. Sweigert, Judge

No. 47261

RUSSELL L. JONES, ET AL., *Plaintiff*,

v.

SHELL OIL COMPANY, *Defendant*.

APPEARANCES:

For the Plaintiffs:

JOSEPH L. ALIOTO,
represented by: KEITH E. PUGH, JR., ESQ.

For the Defendant:

MESSRS. HOWREY, SIMON, BAKER & MURCHISON,
represented by: PAUL E. d'HEDOUVILLE, ESQ.

Plaintiffs' Motion for Protective Order

November 20, 1967

Monday

THE CLERK: Civil Action 47261, Jones, et al., vs. Shell Oil Company. Plaintiffs' Motion for Protective Order.

MR. PUGH: Office of Joseph Alioto by Keith Pugh for plaintiff and moving party.

MR. d'HEDOUVILLE: Paul E. d'Hedouville of Howrey, Simon, Baker & Murchison, attorney for Shell Oil Company.

THE COURT: This is the one where you want a protective order?

MR. PUGH: Yes. We seek a protective order with respect to the answers to certain selected interrogatories which the plaintiffs will be filing with the Court shortly.

We are in effect seeking to extend the coverage which Judge Weigel ordered on the depositions of the plaintiff to the plaintiffs' answers to interrogatories. This matter came up during the interrogatory aspect, came up during the extensive briefing after hearing on the depositions' protective order.

At that time we informally asked the Court to extend the scope of the depositions' protective order to the interrogatory answers and said that if the Court desired it to be formalized we would formalize it and that was the desire of Judge Weigel.

THE COURT: Is that all you want now, to have the depositions sealed?

MR. PUGH: The depositions have already been ordered sealed. We want the interrogatory answers also sealed, answers to five interrogatories.

THE COURT: Have you any objection to it?

MR. d'HEDOUVILLE: Yes, Your Honor, we do object to it.

THE COURT: Why? Would there be any harm done by doing it?

MR. d'HEDOUVILLE: We think in general terms there is harm in withholding this information from the public eye, particularly from the eyes of the Department of Justice which is really the object of the plaintiffs' motion.

Secondly there is harm to the defendant in this action. Many of these answers, including the deposition answers for that matter, are important as part of our pretrial discovery efforts. We have certain witnesses who are available to us and we would like to be able to show them these answers as a means of comparing their testimony to these answers, and again this is withheld from us.

Third, we would like to show some of these answers to personnel of the Shell Oil Company. After all, the plaintiffs are really people of the Shell Oil Company. They bear the Shell trademark.

THE COURT: The plaintiffs brought the suit?

MR. d'HEDOUVILLE: That is right, Your Honor.

THE COURT: Now they want to seal up their answers?

MR. d'HEDOUVILLE: That is right.

THE COURT: But Judge Weigel said to seal the deposition. Why did he say to seal the deposition?

MR. d'HEDOUVILLE: We believe Judge Weigel abused the discretion in that matter and we have filed a notice of appeal to the Ninth Circuit, and whatever this Court decides I believe that order should be subject to the appeal so we won't have to perfect our appeal on this matter.

I want to call Your Honor's attention to one particular individual who is asking for this protective order. This is a plaintiff by the name of Richard Gray. Richard Gray had his deposition taken and he testified at his deposition that he appeared before a Federal Grand Jury, which Federal Grand Jury returned the indictments.

THE COURT: People always have the right to testify on the ground it might incriminate them.

MR. d'HEDOUVILLE: Right.

THE COURT: Motion denied.

MR. PUGH: There are strong constitutional overtones.

THE COURT: Motion is denied. I have gone over it.

MR. PUGH: Your Honor, in this instance—

THE COURT: The motion is denied.

MR. PUGH: I am not sure the Court is aware of the structure of the case. We have an indictment of the plaintiff and we also have a counter-claim—

THE COURT: Motion is denied.

MR. PUGH: Thank you, Your Honor.

APPENDIX B

Shell designated pages 1, 3, 4, 93-96, 212-215 of the deposition of Richard Gray, dated July 24, 1967, as part of the record on appeal (R. 159). However, the clerk of the District Court did not include these pages in the record filed in this Court. We are therefore reproducing these pages as Appendix B.

1 IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 47,261

RUSSELL L. JONES, ET AL., *Plaintiffs,*

v.

SHELL OIL COMPANY, *Defendant.*

DEPOSITION OF RICHARD GRAY

Monday, July 24, 1967

3 BE IT REMEMBERED that, pursuant to Notice, and on Monday, July 24, 1967, commencing at the hour of 10:00 o'clock a.m. thereof, at Room 1010, Shell Building, San Francisco, California, before me, HARRY A. CANNON, a Notary Public in and for the City and County of San Francisco, State of California, personally appeared RICHARD GRAY, called as a witness by the defendant, who, being by me first duly sworn, was thereupon examined and interrogated as hereinafter set forth.

JOSEPH L. ALIOTO, ESQ., MAXWELL M. BLECHER, ESQ., and KEITH E. PUGH, JR., ESQ., represented by KEITH E. PUGH, JR., ESQ., appeared as counsel on behalf of the plaintiffs; and

MESSRS. HOWREY, SIMON, BAKER & MURCHISON, represented by WILLIAM SIMON, ESQ., appeared as counsel on behalf of the defendant.

called as a witness by the defendant, being first duly sworn by the Notary Public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

EXAMINATION BY MR. SIMON:

MR. SIMON: Q. Would you give the reporter your name and address, please.

A. My business address?

Q. Both, please.

A. Richard Gray, 6005 Jarvis Avenue, Newark, California, business address.

35219 Blackburn Drive, Newark, my home address.

Q. Mr. Gray, how long have you been making a living in the gasoline business?

A. About 19 years.

Q. Prior to October 1961, what did you do?

A. Just previous to that I was working for Southern Pacific Railroad for a short time.

Q. For how long?

A. Oh, probably three or four months.

Q. This would be in the summer of 1961?

A. No. I believe it was in the winter, during the Christmas rush.

Q. Prior to that what did you do?

A. I worked for U. S. Naval Air Station, Alameda.

Q. And you in 1961 were not in the gasoline business?

* * * * * * * * * *

93 A. Wayne Campbell.

Q. Who else?

A. Oh, various other ones that I can't call by name right at the present.

Q. What was the purpose of those meetings?

A. Other than to form the association, I really don't know.

Q. Mr. Gray, did you testify before the Federal Grand Jury?

A. I did, sir. I sure did.

Q. When?

A. I don't remember the date.

Q. Tell me how many months ago.

A. It was in '66, I believe.

Q. Was your memory better on these subjects at that time than it is now?

A. It could have been, due to the fact that it was quite some time ago and it was more fresh and I did have some notes at that time.

Q. What happened to those notes?

A. I don't know whether I still have them or not. I believe I do.

Q. Do you know where they are?

A. I believe they are at my residence.

Q. Could you bring them with you tomorrow?

A. I can't come over here tomorrow. I have got a
94 business to operate right now. I'm running short-handed. I also am an area director for a Little League Tournament that has just started. It's the first game today and I have got to be there to direct it. I have got three employees that just quit.

Q. I didn't ask that.

A. I can't make it to another meeting. It is not possible.

Q. Where are those notes?

A. At my home?

Q. Where?

A. If I have them, if I can find them.

Q. Well, do you have them?

A. That's what I say, if I can find them. I would have to be there, right there, to pull open a drawer and look in to be sure they are there. I'm not certain they are still there.

Q. Will you bring those notes when this deposition resumes the next date, whether it is tomorrow or the date the court orders?

A. I could.

Q. Now in addition to the notes, does the fact that it occurred closer to the time of the events mean that your grand jury testimony would be more reliable because you had a better memory at that time?

A. Yes, but most of my notes are not pertaining
95 to any of the information that you are asking here. My notes primarily pertain to my own individual problems at my own service station and as pertaining to Shell Oil Company and at the time of the grand jury investigation I felt that that was the line of inquiry that they were asking for.

Q. Well, in fact were you asked questions before the grand jury along the same lines that I had asked you questions here this morning?

A. I would say quite similar. Even in my grand jury inquiry I told them many times that I couldn't remember, I wasn't sure, I wasn't certain, I didn't know the dates.

Q. But was your memory better than it is now?

A. Oh, absolutely it was better at that time, yes.

Q. You were able to give them more information than you are able to give me, is that correct?

A. That could be a possibility. I don't know how much information that I have given you here that you are wanting, so I don't know how much I gave to the grand jury that they were wanting.

Q. Well, on the—

A. The only thing I could do was to answer to the best of my ability.

Q. On the subjects that I questioned you this morning as to which you were also questioned before the
96 grand jury, were you able to give them more information than you have been able to give me?

A. I don't think so, no.

Q. Is your memory just as good here today on all those subjects?

A. No, definitely not.

Q. Well, if your memory is not as good today, it would

seem to me to follow that you were able to give more answers to the grand jury than you have given me.

A. I would say basically—

MR. PUGH: I object to this whole line of questioning. I think you are arguing with the witness. I think there is no question that if you testified before the grand jury closer in time and proximity to the events that he was testifying about he remembered more about them at that time than he does today. To the degree to which he remembers more, I think it is impossible to ask him that question.

MR. SIMON: I take it, Mr. Pugh, you would join with me in a motion to the court that we be given access to the transcript of his grand jury testimony?

MR. PUGH: No, I won't join in that motion. He is available here to ask questions of to the best of his memory today.

MR. SIMON: This is a breaking point in my outline, if you want to break for lunch, it being 12:30.

* * * * * * * * * * *

212 A. I cannot.

Q. Who brought the surveys to the meeting?

A. I don't have any idea.

Q. Who presented them to the meeting?

A. I don't know whether they were even presented at at a meeting or not.

Q. Well, who initiated their being passed around?

A. I have no idea.

Q. At how many meetings that you attended were surveys of prices either discussed or reviewed or passed around?

A. I don't have any idea.

Q. Would it be 10, 20?

A. I couldn't comment on it. I don't know.

Q. You don't know whether it was either 10 or 20 or 30?

A. No. Sure don't.

MR. PUGH: Or one?

THE WITNESS: Right.

Mr. Simon: Q. Now, who else made surveys of prices besides the people you have already mentioned during the fall of 1966?

A. Nobody that I know of.

Q. Now, sir, yesterday afternoon you testified that you had some documents that you used before the grand jury and that you would bring them if you could
213 find them.

A. No. I had some records that I kept, but they were pertaining to my—wasn't pertaining to any association meetings. It was pertaining to my termination by Shell Oil Company primarily and the circumstances and the events leading up to it and events after my termination.

Q. You testified you had some documents that you brought with you to the grand jury room?

A. Correct. Those are the documents that I took, but I didn't use them at the grand jury, because the questions thta they asked me were not pertaining to the information that I had in those documents.

Q. Were you asked any questions before the grand jury in which you used those documents to refresh your recollection?

A. No.

Q. Did you give any testimony before the grand jury on the subject matter of the documents?

A. Yes, I believe so.

Q. Did you give that testimony without looking at the documents?

A. Only partially. Yes.

Q. And to what extent did you look at the documents in answer to—

A. I didn't look at the documents. I only
214 partially gave a statement to the grand jury pertaining to what was in the documents.

Q. Did you find those documents last night?

A. I did not even look.

Q. I see.

A. Like I told you, I'm involved in this Little League. I got there just at the starting game. We did win the game. And we had a little celebration thereafter. My son has got the mumps. And we were busy taking his temperature.

Q. But you did not take the trouble to look and see if you still had the documents?

A. Not take the trouble. I just forgot about it in my haste to get over here this morning and beat the traffic.

Q. So we still don't know whether the documents are at your house?

A. No, we do not.

Q. Now, sir, besides the subject matter of the documents, what other subjects were interrogated on before the grand jury?

A. Man, I don't know. I'm sure you have a record of that and—

Q. No, I don't. But I hope to get it.

A. You'd have to go after that testimony. I don't remember. It was questions on meetings similar to
215 the questions that you're asking me here and questions pertaining to the telegrams that were sent and—

Q. What other subjects?

A. They asked about stamps.

Q. Were you asked about meetings at which price increases were discussed?

A. I was, yes.

Q. What did you say in response to the questions about meetings at which prices were discussed?

A. I really don't remember.

Q. You don't remember what you said?

A. I probably said I really don't remember to them.

Q. How long were you before the grand jury?

A. Let's see. I think in the area of around an hour, hour and a half maybe.

Q. Did you waive immunity before the grand jury?

A. I did not, no.

Q. Can you recall anything that you testified to before the grand jury with respect to dealer meetings and the matter of retail prices that you have not testified to in this deposition yesterday or today?

A. No, I can't.

Q. Now, sir, yesterday you referred to a man named Jim. And you some times referred to him as Big Jim.

Can you give me his last name?

A. I believe it's Turner. I'm not positive. I'm * * *

* * * * * * * * * *